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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MOL, INC., Petitioner,

v.

THE PEOPLES REPUBLIC OF BANGLADESH, Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

When a foreign government contracts to grant an American corporation an exclusive license to export certain animals in return for a royalty, and later exercises a contractual right of termination on the ground that the American corporation has allegedly failed to perform its contract obligations, has the foreign government engaged in commercial activity within the meaning of the Foreign Sovereign Immunities Act so that the courts of this country have jurisdiction of the American corporation's action for breach?[1]

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[1]The Peoples Republic of Bangladesh, defendant, did not appear in the trial court or in the United States Court of Appeals for the Ninth Circuit. Arguments in support of its immunity were presented to both courts by Attorneys for Animal Rights, an unincorporated association with its principal office in San Francisco, California, appearing as amicus curiae.

Petitioner MOL, Inc. has no corporate parent company, subsidiaries, or affiliates.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported as *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984). The decision of the United States District Court for the District of Oregon is reported as *MOL, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79 (D. Or. 1983).

THIS COURT'S JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on July 3, 1984. This petition for certiorari is timely because it is filed within 90 days of that decision. 28 U.S.C. § 2101(c).

This court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves various provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1602-1611. Pertinent provisions of the Act are reproduced at pp. 43-48 of the Appendix.

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction.

This is an action against a foreign state for breach of contract. The jurisdiction of the United States District Court for the District of Oregon was invoked pursuant to 28 U.S.C. § 1330(a) which grants jurisdiction in all nonjury civil actions against foreign states

> ". . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."

The defendant's entitlement to immunity is the issue in this case.

2. Facts and Procedural History.

In March of 1977, MOL Enterprises Incorporated, an Oregon corporation, and the Government of the Peoples Republic of Bangladesh executed an agreement which contained the following provisions, among others:

1. Bangladesh granted MOL an exclusive license and franchise to export rhesus monkeys for a period of ten years.

2. As consideration for that ten year exclusive license, MOL agreed to pay Bangladesh a royalty for each monkey exported.

3. MOL agreed to keep complete and accurate records showing the disposition and use of each exported monkey, and to make those records available for inspection by Bangladesh at MOL's place of business.

4. MOL agreed to construct a breeding farm in Bangladesh during 1978.

5. The number of monkeys from the wild which could be exported in any given year was limited; any number bred on a breeding farm could be exported.

6. The parties agreed that the monkeys exported under the contract

> ". . . shall be used exclusively for the purposes of medical and other scientific research by highly skilled and competent personnel for the general benefit of all peoples of the world."

7. Disputes between the parties arising out of the agreement would be resolved by arbitration.

8. The parties recognized that the agreement was intended to be enforceable by both:

> "This Agreement shall be binding upon and shall inure to the benefit of the Licensor and Licensee, their successors and assigns . . . ."

9. The contract gave Bangladesh the right to terminate the agreement without

notice if MOL "failed to fulfill its obligations under this Agreement."

The parties contemplated that the primary market for the exported monkeys would be research organizations in the United States. Rhesus monkeys are valuable for research. In November of 1977 India, previously a major supplier, banned the export of its rhesus monkeys. Thereafter world prices rose while the price under the contract between Bangladesh and MOL was fixed by its terms.

The contract was performed through the end of 1977 and for a part of 1978. Then, in May of 1978, Bangladesh threatened to cancel the contract on the ground that MOL had not taken steps to construct a breeding farm and that it had not exported enough monkeys. MOL requested permission to build the breeding farm and requested arbitration but Bangladesh ignored those requests. In December of 1978 Bangladesh issued trapping

permits to another exporter in violation of MOL's exclusive rights under the contract.

On January 3, 1979 Bangladesh announced the termination of the contract, invoking its right under the agreement to terminate if MOL failed to fulfill its obligations. Bangladesh identified two alleged failures by MOL: it claimed that MOL had not constructed the breeding farm in 1978 and that MOL had sold monkeys "to the Armed Forces Radiobiology Research Institute for neutron bomb radiation experiments" in violation of the contract provision that the monkeys be used only for research "for general benefit of all the peoples of the world."

Bangladesh continued to ignore MOL's attempts to resolve the dispute. Those attempts included requests for meetings, requests for arbitration, offers to renegotiate the contract, and a showing that no monkeys sold to the Armed Forces

Radiobiology Research Institute were exposed to neutron radiation and that no such research is conducted by that facility.

Finally, in 1982, MOL brought suit against Bangladesh in the United States District Court for the District of Oregon. Bangladesh, although served with summons, made no appearance and MOL sought a default judgment after providing the court with evidence to support its claim of breach and its damages as required by 28 U.S.C. § 1608(e). The district court held that Bangladesh was immune from suit under the circumstances of this case because granting the export license was a sovereign act. It also held that the action was barred by the act of state doctrine. It denied the motion for a default judgment and dismissed the action.

MOL appealed to the United States Court of Appeals for the Ninth Circuit.

That court affirmed on sovereign immunity grounds, concluding that because it involved a natural resource the license agreement "was a sovereign act, not just a commercial transaction." The court did not reach the issue of the application of the act of state doctrine.

ARGUMENT

1. Introduction.

The United States Court of Appeals for the Ninth Circuit held that the courts of this country do not have jurisdiction to hear MOL's breach of contract action on the sole ground that neither the contract in question nor its breach were "commercial activities" within the meaning of the Foreign Sovereign Immunities Act (FSIA). This court has never construed the relevant statutes.

As this petition will show, the Ninth Circuit has mistakenly applied those statutes in a mechanical fashion contrary

to the intent of Congress. The effect of its decision is that no one can enter a commercial contract with a foreign government when the subject matter of that contract is a natural resource and be assured that disputes arising out of the performance of that contract will be heard by the courts of this country.

2. Reasons for Granting Certiorari.

This case presents an excellent opportunity for this court to give some much-needed guidance on the meaning and scope of the FSIA.

The opinion in this case compounds what is probably the greatest area of ambiguity in the critical FSIA definition of a "commercial activity," that is, the activities of sovereigns who let contracts for the development of their natural resources. The federal courts have been struggling with the "commercial activity" exception to sovereign immunity since the

adoption of the FSIA.[2] The Ninth Circuit here held that the granting of a license or contract to exploit natural resources is not a "commercial activity" within the meaning of the FSIA, a proposition with which petitioners do not quarrel. However, the court went beyond that to hold that the termination of this contract, done expressly and entirely pursuant to cancellation rights created and spelled out in the contract, and not by decree or law, could *not* be a commercial activity. Despite its

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[2]Recent cases include *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195 (5th Cir. 1984); *Ministry of Supply, Cairo v. Universe Tankships, Inc.*, 708 F.2d 80 (2d Cir. 1983); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied* 454 U.S. 1148 (1982); *Schmidt v. Polish People's Republic*, 579 F. Supp. 23 (S.D.N.Y. 1984); *Wyle v. Bank Melli of Tehran, Iran*, 577 F. Supp. 1148 (N.D. Cal. 1983); *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982); *International Association of Machinists v. OPEC*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd on other grounds* 649 F.2d 1354 (9th Cir. 1981), *cert. denied* 454 U.S. 1163 (1982).

recognition that the definition of a "commercial activity" turns on the *particular act* in question, the court held that *no act* of a foreign sovereign can be a commercial activity where the subject matter is a natural resource.

The court has thus extended a blanket immunity to foreign sovereigns for an entire field of activity where it is apparent that Congress intended to supply case-by-case immunity depending on the particular acts involved.

Certainly one of the most significant commercial activities of this century has been the development of foreign resources (oil, metals, agriculture) by United States enterprises. Such development has benefited not only the United States, but foreign countries as well, as witness the transformation of Saudi Arabia from a barren land of poverty-stricken nomads to a wealthy modern society. Yet the Ninth

Circuit would hold that *nothing* in connection with such development is within the reach of our courts, nothing in connection with such development may be "commercial."

Such a holding puts United States enterprises at a disadvantage lacking basis in logic, fairness or reality. The fact is that some actions taken by foreign governments with regard to resource development plainly represent expressions of national policy, such as an oil embargo imposed on a nation which has affronted the sovereign. However, it is just as true that other actions taken by foreign sovereigns with regard to resource development are commercial activities, pure and simple. The Congress in enacting the FSIA listed a "mineral extraction company" as an example of "a commercial enterprise." See pp. 17-18, *infra*.

The court should not accept the Ninth Circuit's idea that any activity with

regard to resource development is necessarily *not* commercial, that our courts must keep their hands off *all* disputes in that area. It should define guidelines whereby logic, reality and fairness may be incorporated into the decision-making process to make the case-by-case judgments that Congress intended. Foreign governments should not be permitted to merchandise their resources, and to conduct themselves solely as merchants, without the liability of merchants. Disputes over rights and responsibilities arising not from sovereign power, but solely from the commercial process of bargaining and agreement, should be subject to review in the United States courts where the other requirements for jurisdiction are met.

The importance of the decision is enhanced by the fact that we live in times when the system of justice is in retreat. According to Amnesty International,

judicial freedom has shriveled world-wide in past years. The instant case is typical. During the pendency of this dispute, the Bangladeshi military overthrew the civilian government and abolished the constitution, thus voiding a legal system inherited from the British. Rule is now by decree. Resort to American courts is thus becoming increasingly important to American individuals and companies who do business abroad, often in response to promotional activities of the foreign governments -- such as Bangladesh -- who actively seek foreign investment and foreign commerce.

Petitioners submit that the appropriate intervention of the United States courts in commercial disputes with foreign sovereigns would be a positive incentive to international trade, to the benefit not only of the American companies involved but the foreign sovereigns seeking American involvement and American investment. The

high barrier thrown up by the Ninth Circuit should be removed.

For all of the above reasons, petitioner would submit that this is an important and appropriate case for review.

3. The Statutes.

The FSIA provides that a foreign state shall not be immune from the jurisdiction of the courts of this country in any case

> "(2) in which the action is based [a] upon a commercial activity carried on in the United States by the foreign state; or [b] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [c] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a).

MOL invoked the jurisdiction of the United States District Court for the District of Oregon under that subsection, arguing that the facts would support jurisdiction under the clauses designated [a] and [c] in the

above quotation. The Ninth Circuit did not decide which of those clauses was properly applicable because it decided that Bangladesh had not engaged in any commercial activity at all.

As defined in the FSIA a "commercial activity" means:

> ". . . either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

The legislative history of the FSIA contains a number of examples of commercial activity which Congress intended would not support a claim of immunity. Those examples include:

1. Carrying on a commercial enterprise such as a "*mineral extraction company*," an airline or a state trading corporation. House Judiciary Committee, H.R. Rep. No. 1487, 94th Cong., 2d Sess.

("House Report") 16, reprinted in 1976 U.S. Code Cong. & Adm. News 6604, 6614-15. [Emphasis added.]

2. A contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building. *Id.*

3. A foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagements of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation. *Id.*

As the committee report explains, it is the essentially commercial nature of an activity or transaction that is critical; a commercial contract is within the exception to sovereign immunity even if its ultimate object is to further a public function. House Report at 16; U.S. Code Cong. & Admin. News at 6615.

In short, Congress intended that when a foreign government decides, for whatever reason, to enter the commercial marketplace the courts of this country will have jurisdiction, if other statutory requirements are met, to adjudicate disputes which arise out of its activities in that marketplace. The courts below, however, ignored that intent and the language of the Act and held that this case did not involve any commercial activity by Bangladesh because the subject matter of the contract was a "natural resource."

4. The Ninth Circuit Ignored the Commercial Nature of the Contract and Its Termination.

The conclusion does not follow. Activities which could only be performed or authorized by a sovereign in the first instance may nevertheless be commercial in nature.

A foreign nation, acting in its sovereign capacity, may decide to engage in commerce. That decision should not be subject to review by the courts of this country. But once that decision has been made and the sovereign actually engages in commercial activity it has no immunity under the FSIA. The fact that the commercial activity involves natural resources should make no difference. It is the nature of the activity which is controlling.

It is clear that Congress did not intend a blanket immunity for all activities involving natural resources. One of the examples in the legislative history of a commercial enterprise for which there would be no immunity is a "mineral extraction company." House Report at 16; U.S. Code Cong. & Adm. News at 6614-15. Certainly Congress did not mean that a foreign nation could cloak all of its commercial

activities involving natural resources in immunity simply by engaging in them directly rather than through the formation of a company for that purpose.

The exercise of government prerogatives does not confer immunity for commercial activities which follow. For example, in *United Euram v. U. of Soviet Socialist Republics*, 461 F. Supp. 609 (S.D. N.Y. 1978) the plaintiff, an impresario, sued the U.S.S.R., its Ministry of Culture, and its State Concert Society for breach of contracts in which the State Concert Society agreed to send artists to the United States and Great Britain to give performances organized by the plaintiff. Plaintiff was to make certain payments in return. Those contracts were authorized by a cultural exchange agreement between the United States and the U.S.S.R., but they were nevertheless held to be commercial because they were agreements for the sale

of a service. The fact that their purpose was to carry out a governmental policy was irrelevant.

Similarly, in this case, Bangladesh may have entered into this license agreement in order to carry out its sovereign policy with respect to exploitation of a natural resource, and may have decided in its sovereign capacity that the agreement should contain certain terms. Those decisions are not challenged here and are irrelevant because the nature of the agreement itself is commercial. It is purchase-sale arrangement between Bangladesh and an American corporation under which the corporation was to pay Bangladesh for the right to develop and market a product which belonged to Bangladesh.

No case has held, either under the FSIA or the "act of state" doctrine, that the action or contract of a foreign

sovereign could not be examined in the courts of this country because natural resources were involved. Instead the courts look to the nature of the action and the kind of determination which would be required. A district court opinion provides an example. In *Matter of Sedco, Inc.*, 543 F.Supp. 561 (S.D. Tex. 1982) the court held that an agency of the Mexican government was immune from suit in this country arising out of consequences of its exploration of offshore oil deposits. It was immune not because natural resources were involved but because the activity was not commercial. The agency was acting solely to provide the government with information for planning purposes. No sales or commercial transactions were involved. The court's opinion shows its understanding of the proper inquiry:

> "There is little doubt that where a foreign nation enters into the world marketplace to purchase or sell goods, it has

> engaged in commercial activity for purposes of the FSIA . . . ." 543 F. Supp. at 565.
>
> "The FSIA requires the Court to focus on the specific act by a foreign state made the basis of the lawsuit. The Court must regard carefully a sovereign's conduct with respect to its natural wealth. A very basic attribute of sovereignty is the control over its mineral resources and *short of actually selling these resources on the world market*, decisions and conduct concerning them are uniquely governmental in nature . . . ." 543 F. Supp. at 566 [Emphasis added.]

Bangladesh did *not* stop short of the crucial step identified in that quotation. It took that very step when it entered into a contract with MOL to profit from sales of rhesus monkeys on the world market.

MOL would have had a right to be astonished if it had been told when it entered into the contract that this was not a commercial transaction. The agreement gave MOL the right to take and to export for resale a product which Bangladesh owned, and which was in commercial demand.

MOL agreed to pay a royalty to Bangladesh for each monkey it exported for resale. Those promises were expressly made binding on both parties. Disputes were to be resolved by arbitration.

These provisions are the very essence of a commercial contract. Furthermore, the contract reserved to Bangladesh the right to terminate the agreement if MOL failed to perform. Bangladesh announced the termination by invoking that very contract right.

Bangladesh did not ban the export of all rhesus monkeys. It did not refuse to recognize exclusive contracts. It did not enact any decree, pass any law or regulation, or purport to act pursuant to any decree, law or regulation. It was not exercising sovereign powers but contractual powers, acting solely as a party to a market-oriented contract.

To adjudicate this dispute, the court would not have to examine the motives of a

foreign sovereign or the premises or validity of its policy decisions. It would only have to determine whether or not MOL failed to perform specific contract obligations, giving Bangladesh the right under the contract to terminate the agreement. If the court found in MOL's favor on that issue, it would have to determine the amount of damages.

CONCLUSION

Bangladesh entered a commercial contract. It terminated that contract, acting pursuant to the contract, alleging breach of its terms. MOL denies that breach and contends the termination is wrongful. This is precisely the kind of dispute which Congress intended should be decided in the courts of this country rather than left to the uncertainties of the diplomatic arena. This court should issue its writ of certiorari to the United

States Court of Appeals for the Ninth Circuit and should reverse that court's decision and remand for determination of the remaining issues in this case.

Respectfully submitted,

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
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MILDRED J. CARMACK

By: _____
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Of Attorneys for
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MOL, INC., Plaintiff-Appellant,

v.

The PEOPLES REPUBLIC OF BANGLADESH,
Defendant-Appellee.

No. 83-4094.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 14, 1984.

Decided July 3, 1984.

Appeal from the United States District Court for the District of Oregon.

Before WRIGHT, HUG, and NELSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

MOL, Inc., sues Bangladesh for termination of a licensing agreement for the export of rhesus monkeys from Bangladesh. Because the granting and revocation of a license to export a natural resource are sovereign acts, we have no jurisdiction over this claim. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1604.

FACTS

In 1977, a division of the Bangladesh Ministry of Agriculture granted MOL, Inc., an Oregon corporation, a ten-year license to capture and export rhesus monkeys. The licensing agreement specified quantities and prices and required MOL to build in Bangladesh in 1978 a breeding farm for rhesus monkeys. .

By its terms, the agreement was granted "on the grounds and sole condition that the primates exported by [MOL] from Bangladesh shall be exclusively for the purposes of medical and other scientific research by highly skilled and competent personnel for the general benefit of all peoples of the world." To enable Bangladesh to monitor uses of the monkeys, it required MOL to keep available records on each monkey and arrange for duplicate records in Bangladesh.

The agreement provided for arbitration of disputes, each party selecting one arbitrator. Bangladesh reserved the right to terminate the agreement "without notice if [MOL] has failed to fulfill its obligations under this Agreement."

In November 1977, India banned the export of its rhesus monkeys. As India had been the major exporter of these animals, which are valuable for research because of their anatomical and behavioral similarity to humans, Bangladesh became an important supplier. Although world monkey prices rose while MOL's payments to Bangladesh remained fixed, Bangladesh complied with the licensing agreement through the spring of 1978.

Bangladesh threatened to cancel the agreement in May 1978 because MOL had not built the breeding farm or exported agreed quantities. MOL denied any departure from the agreement. In September 1978, it

delivered some Bangladesh monkeys to the United States armed services for radiobiological research.

Bangladesh announced on January 3, 1979, that it was terminating the agreement because MOL had not constructed the breeding farm in 1978 and had breached the requirement that the monkeys be used only for humanitarian purposes. It claimed that MOL sold the monkeys to the armed services for "neutron bomb radiation experiments."

When MOL sought arbitration, Bangladesh refused, asserting its right to terminate for breach by MOL. Apparently MOL asked the State Department to intervene. Despite these efforts and MOL's reassurances that monkeys would not be used for radiation experiments, Bangladesh did not reinstate the licensing agreement.

In 1982, MOL sued Bangladesh for $15 million. Bangladesh did not appear, and MOL moved for default. Amicus curiae,

Attorneys for Animal Rights, moved to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1604. The district court, 572 F. Supp. 79, denied the default judgment and dismissed the action, holding it barred both by the FSIA and by the act of state doctrine.

Because we decide that the district court lacked jurisdiction under the FSIA, we do not reach the issue whether the act of state doctrine prevented the district court from exercising its jurisdiction.

SOVEREIGN IMMUNITY

MOL argues that Bangladesh does not enjoy sovereign immunity because its acts fall under the commercial activity exception of the FSIA. That Act denies immunity in any case in which the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state

elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). The exception turns on whether the act is commercial:

> "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

A. Burden of Proof.

As section 1330(a) indicates, sovereign immunity is not merely a defense under the FSIA. Its absence is a jurisdictional requirement. *See Verlinden B.V. v. Central Bank of Nigeria*, ____ U.S. ____, 103, S. Ct. 1962, 1971, 76 L. Ed. 2d 81 (1983). This jurisdictional aspect means that if the foreign state does not appear to assert an immunity defense, the court must satisfy itself on the question of immunity. *Id.* at 1971 & n. 20.

The district court here recognized its duty in view of Bangladesh's default, and considered carefully whether the commercial activity exception applies.

B. Commercial Activity.

A crucial step in determining whether the basis of this suit was a commercial activity is defining the "act complained of here." *IAM v. OPEC*, 649 F.2d 1354, at 1357-58; *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S. Ct. 1012, 71 L. Ed. 2d 301 (1982) (*act of state* cases). The court must then decide whether that act is commercial or sovereign.

MOL asserts that the activity here relates to Bangladesh's contracting to sell monkeys. It admits that licensing the exploitation of natural resources is a sovereign activity. *Cf. Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712

F. 2d 404, 408 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 104, S. Ct. 703, 79 L. Ed. 2d 168 (1984) (*act of state* doctrine applied). It argues, however, that this suit arises not from license revocation but from termination of a contract. In essence, Bangladesh lost its sovereign status when it contracted and then terminated pursuant to contract terms.

The argument seems persuasive because, in breaking the agreement, Bangladesh itself spoke in commercial terms, basing its termination on MOL's alleged breaches. The true nature of the action, however, does not depend on terminology.

Bangladesh was terminating an agreement that only a sovereign could have made. This was not just a contract for trade of monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative. *See Bokkelen v. Grumman Aerospace Corp.*, 432

F. Supp. 329, 333 (E.D. N.Y. 1977). It concerned Bangladesh's right to regulate its natural resources, also a uniquely sovereign function. *See IAM v. OPEC*, 477 F. Supp. 553, 567-68 (C.D. Cal. 1979) (citing United States and international authority), *aff'd on other grounds*, 649 F.2d 1354 (9th Cir. 1981). A private party could not have made such an agreement. *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704, 96 S. Ct. 1854, 1866, 48 L. Ed. 2d 301 (1976); *Clayco*, 712 F.2d at 408.

MOL complains that this conclusion relies on the *purpose* of the agreement, in contradiction of the FSIA. See 28 U.S.C. § 1603(d). But consideration of the special elements of export license and natural resource looks only to the *nature* of the agreement and does not require examination of the government's motives.

In short, the licensing agreement was a sovereign act, not just a commercial transaction. Its revocation was sovereign by nature, not commercial. Bangladesh has sovereign immunity from this suit.

C. Direct Effect.

Because the act complained of was not a commercial activity and Bangladesh has sovereign immunity, effect in the United States is irrelevant. See 28 U.S.C. § 1605(a)(2).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MOL, INC.,	)	
	)	
Plaintiff,	)	Civil No. 82-892-RE
v.	)	
	)	OPINION
THE PEOPLES REPUBLIC OF BANGLADESH,	)	[filed August 19, 1983]
	)	
Defendant.	)	

REDDEN, Judge:

In this action plaintiff MOL, Inc., an Oregon corporation, seeks damages against a foreign nation, the People's Republic of Bangladesh. Defendant Bangladesh has not responded to this action and plaintiff seeks default judgment. I deny the motion for default judgment and dismiss the action because it is barred by the Act of State Doctrine, and I lack subject matter jurisdiction over this controversy.

FACTS

Plaintiff seeks to challenge the revocation of a license granted by

Bangladesh allowing it to capture and export rhesus monkeys from that country to the United States. The rhesus monkey, *macaca mulatta*, is a primate which ranges across much of southern Asia. Their anatomical and behavioral similarities to humans makes rhesus monkeys valuable for research purposes.

Until relatively recently, India was the major exporter of rhesus monkeys. Following India's ban on their export, Bangladesh became the world's principal source of supply. Rhesus monkeys have no particular religious significance in Bangladesh, a predominantly Muslim country.

In September 1976, plaintiff entered into negotiations in Bangladesh with representatives of the government of that nation, seeking to acquire a license from the Bangladesh Ministry of Agriculture, Division of Forests, Fisheries, and Livestock for the capture and export of

rhesus monkeys. Six months later, Bangladesh granted that License in a document which is attached to plaintiff's motion as Exhibit A. In essence, the government of Bangladesh granted a license to plaintiff for the export of rhesus monkeys, in specified quantities and at specified prices. The Licensing Agreement also required that plaintiff construct, during 1978, a "breeding farm" for rhesus monkeys. The License also contains the following language regarding the use of the rhesus monkeys for humanitarian purposes, which is quoted here in full:

> "USE OF RHESUS MONKEYS
>
> "33. This franchise and license is granted to Licensee by Licensor *on the grounds and sole condition* that the primates exported by Licensee from Bangladesh shall be used *exclusively* for the purposes of medical and other scientific research by highly skilled and competent personnel *for the general benefit of all peoples of the world*. It is generally understood that major contributions of nonhuman

> primates in medical programs include the unique functions of the study of physiology and immunology, infectious disease, cancer, metabolic disorders, cardiovascular and pulmonary disease, alcoholism, drug abuse, behavior, testing of biologics, and the reproduction of vaccines.
>
> "34. Licensee shall keep complete and accurate records as to the disposition and use of *each* Rhesus monkey exported from Bangladesh under this Agreement. These records shall be available for inspection by Licensor at any time during normal working hours or at other times upon reasonable notice. Licensor shall have notice at all times of the location of the records. To facilitate record keeping, each Rhesus monkey shall be individually identified by marking or tagging. The records are subject to audit at the discretion of Licensor. Licensor may request and receive copies of these records at any time. Duplicate [sic] of these records shall be kept in Bangladesh."

Licensing Agreement at page 14 (Emphasis added).

The Licensing Agreement also provides for the arbitration of disputes and gives Bangladesh the right to cancel the license

without notice upon plaintiff MOL's nonperformance of its terms:

> "42. Any dispute between the parties, arising out of or in connection with this Agreement which cannot be resolved by the parties shall be resolved by arbitration in accordance with the provisions of the Arbitration Act, 1940, as adopted in Bangladesh. There shall be two arbitrators, one to be selected by Licensor and the other by Licensee.
>
> "43. TERMINATION. This agreement may be terminated by Licensor without notice if Licensee has failed to fulfill its obligations under this Agreement."

Licensing Agreement at page 18.

The Agreement was fully performed by all parties throughout the remainder of 1977. In November 1977, the government of India banned the export of rhesus monkeys. Bangladesh thus became the only remaining source for large numbers of wild rhesus monkeys for export. World prices for monkeys soared and the prices Bangladesh received from plaintiff were lower than

world prices. The government of Bangladesh continued to comply with the Agreement throughout the remainder of 1977.

In spring of 1978, the shortage of rhesus monkeys for research purposes in the United States became more acute. In late May of 1978 Bangladesh issued a notice to plaintiff in which cancellation of the license agreement was threatened in retaliation for plaintiff's alleged failure to construct a breeding farm, and to export monkeys in agreed numbers. Plaintiff responded to the notice from the government of Bangladesh by offering to begin work immediately on the breeding farm and by stating that its behavior was consistent with the Agreement. In September 1978, plaintiff dispatched a number of rhesus monkeys to the Armed Forces Radiobiology Research Institute for radiobiologic research. On January 3, 1979, Bangladesh announced that it was terminating the

License because plaintiff had not constructed a "breeding farm" during 1978 as provided by the Licensing Agreement, and because plaintiff had breached Section 33 of the License, relating to the use of the monkeys only for humanitarian purposes, claiming that "the Rhesus monkeys exported from Bangladesh were sold to the Armed Forces Radio Biology Research Institute for neutron bomb radiation experiments." *See* Affidavit of O'Loughlin at 5.

Plaintiff sought arbitration as provided by Section 42 of the Licensing Agreement, but Bangladesh asserted that its termination of the License pursuant to Section 43 was proper and lawful, and refused to arbitrate.

Plaintiff sought a diplomatic or political solution to the problem. Plaintiff offered to renegotiate the licensing agreement, and to give assurances of observation of any provision or clause

in the license banning the use of monkeys for armed forces radiation experiments. Plaintiff also sought the aid of United States diplomatic representatives. Bangladesh refused to reinstate the License.

In 1982, plaintiff instituted this action against Bangladesh seeking damages for Bangladesh's termination of the License. Bangladesh has not appeared to defend this action, and plaintiff moves for a default judgment. The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.*, contains a provision forbidding United States courts from granting a default judgment against a foreign sovereign "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). The purpose of this provision is to prevent unwarranted intrusions upon the diplomatic efforts of the United States

by private litigants. Plaintiff in this case has filed affidavits and documents in support of its motion. *Amicus curiae* filed briefs with the court opposing the motion, arguing that foreign sovereigns' regulation of their natural resources and animal populations cannot be challenged in this court. I turn to a brief discussion of the applicable law, the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq*.

THE APPLICABLE LAW

A. Foreign Sovereign Immunity.

Prior to 1976, the federal courts had developed a doctrine of foreign sovereign immunity which, while nominally absolute, also depended upon the judgment of the executive branch of the United States, acting through the Department of State, to assert or not assert sovereign immunity for a foreign sovereign in a particular case. *See generally Verlinden B.V. v. Central*

Bank of Nigeria, ____ U.S. ____ at ____, 103 S. Ct. 1962 at 1967-1968 (1983); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 Yale Stud. in World Public Order 1 (1976). The State Department would generally assert only a "restrictive" theory of sovereign immunity, which barred suit against the foreign sovereign for its "governmental" public actions, and did not extend to "commercial" transactions. This doctrine, as stated in the "Tate Letter," relied upon a survey of the development of sovereign immunity law in other nations, which appeared to disclose a trend towards a "restrictive" view of sovereign immunity, in which a foreign sovereign would have immunity for its sovereign or public acts (*jure imperii*), but not its "private" acts (*jure gentionis*). (The "Tate Letter" is reprinted as Appendix 2 to the opinion of the United States Supreme Court in *Alfred*

Dunhill of London v. Republic of Cuba, 435 U.S. 682, 711-715, 96 S. Ct. 1854, 1869-1871, 48 L. Ed. 2d 301 (1976)). This "restrictive" view was ultimately codified by Congress in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* (hereafter "FSIA").

The FSIA provides, at 28 U.S.C. § 1604, that foreign sovereigns "shall be immune from the jurisdiction of the courts of the United States and of the States," unless one of the exceptions stated in 28 U.S.C. § 1605 applies. The relevant provision for this case is 28 U.S.C. § 1605(a), which provides:

> "A foreign state shall *not* be immune from the jurisdiction of the United States or the States in any case --
>
> "(1) in which the foreign state has *waived* its immunity either explicitly or by implication . . .
>
> "(2) in which the action is based upon a *commercial* activity carried on *in the United States* by the foreign state;

> or upon an act *performed in the United States* in connection with *a commercial activity of* the foreign state *elsewhere*; or *upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;*
>
> *". . . ."*

28 U.S.C. § 1605(a) [Emphasis added.]

The plaintiff in this case does not contend there has been any waiver by Bangladesh of its sovereign immunity, but rather proceeds under the third clause of 28 U.S.C. § 1605(a)(2), the language of which is in emphasis above. That clause, of course, depends for its meaning upon the definition of "commercial activity," which is defined in 28 U.S.C. § 1603(d) as follows:

> "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the

> nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d).

In this case, therefore, the issue is whether Bangladesh's regulation of the capture and export of game is a "commercial" or "governmental" activity.

B. The Act of State Doctrine.

The Act of State Doctrine is a legal principle which, like sovereign immunity, represents an attempt to deal with the special jurisprudential problems affecting the relations between sovereign states. *See generally International Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1358-1361 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163, 102 S. Ct. 1036 (1982). The two doctrines differ, however, in that the sovereign immunity question goes to the jurisdiction of the court, while the Act of State Doctrine is a "prudential doctrine," a domestic legal principle developed by the

courts of the United States, allied to the "political question" doctrine. *Id.* at 1359. The Act of State Doctrine requires that courts "not adjudicate a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Id.* at 1358. The Act of State Doctrine was not repealed or limited by the passage of the Foreign Sovereign Immunities Act, *Id.* at 1359, and since the Act of State Doctrine has "constitutional underpinnings," *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423, 84 S. Ct. 923, 937, 11 L. Ed. 2d 804 (1964), it appears that Congress would have lacked the authority to limit the doctrine. In fact, Congress purposefully avoided any abrogation of the Act of State Doctrine in its passage of the Foreign Sovereign Immunities Act, and it is clear that the Act of State Doctrine remains vital. *See*

International Assn. of Machinists, supra, 649 F.2d at 1359.

Nor does Congress' recognition of the "commercial activity" exception in a sovereign immunity context dilute the Act of State Doctrine where it applies. *Id.* at 1360. In some instances both the "commercial activity" exception to sovereign immunity *and* the Act of State Doctrine will apply; in those cases, dismissal of the suit is nevertheless necessary:

> "The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity. While purely commercial activity may not rise to the level of an act of state, certain seemingly commercial activity will trigger act of state considerations. . . . While the [Foreign Sovereign Immunities Act] ignores the underlying purpose of a state's action, the act of state doctrine does not. This court has stated that the motivations of the sovereign must be examined for a public interest basis. [Citation omitted] When the state *qua* state acts in the public

> interest, its sovereignty is asserted. The courts must proceed cautiously to avoid an affront to that sovereignty. *Because the act of state doctrine and the doctrine of sovereign immunity address different concerns and apply in different circumstances, we find that the act of state doctrine remains available where such caution is appropriate, regardless of any commercial component of the activity involved.*

Intern. Assn. of Machinists v. OPEC, *supra*, 649 F.2d at 1360. [Emphasis added; footnote omitted.]

The issue in this case, then, is whether, assuming some commercial component in Bangladesh's regulation of wildlife within its borders, Bangladesh has acted "in the public interest," so as to assert its sovereignty. If so, the Act of State Doctrine requires dismissal.

DISCUSSION

A. Bangladesh Is Immune from Suit Under the Facts of This Case.

Under 28 U.S.C. § 1605(a)(2), clause 3, I am required to determine whether Bangladesh's issuance of a License for the capture and export of rhesus monkeys constituted "commercial activity." The definition of "commercial activity" for purposes of the FSIA, previously quoted, required that this determination turn upon "the nature" of the activity, rather than its purpose. 28 U.S.C. § 1603(d). The legislative history of the FSIA indicates that the classification of particular activities was intentionally avoided by Congress, which left this problem to development by the courts on a case-by-case basis. See H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess., at p. 16 *reprinted in* [1976] *U.S. Code Cong. and Admin. News* 6615.

I conclude that Bangladesh's granting of the License to plaintiff in this case was not a "commercial activity," but a sovereign act not subject to suit in United States courts. The granting of such a license as part of a comprehensive regulation of wildlife under the police power is an action in which the sovereign power is essential. Likewise the granting of an export license, like the power to exclude imports or regulate exports in general, is a power possessed only by sovereigns, not private parties. I find that the activity in suit here is by its "nature" sovereign activity.

The plaintiff argues that the purpose of the License was to generate revenue for Bangladesh, and thus the License is of a commercial nature. The *purpose* of the activity is irrelevant under the statute. 28 U.S.C. § 1603(d). If I were allowed to consider the purpose of the activity, it

would clearly indicate that the activity was based upon the "public interest" as perceived by the government of Bangladesh, to conserve wildlife and establish closer control over the exportation of Bangladeshi species. This is true even if Bangladesh receives revenue from the License. The power to tax, or the power to levy a duty upon exports or imports, is a sovereign function designed solely to bolster the fisc by generating state income; yet these activities do not thereby become "commercial." Even if Bangladesh's sole purpose in entering into the License was to generate revenue (and the record reveals other goals, including the conservation of wildlife and the meeting of a demand for humanitarian purposes), the granting of the License in this case was not a commercial activity.

However, the purpose of the activity, as opposed to its "nature," is not relevant

for immunity purposes. The "nature of the activity in suit is the regulation of wildlife. This is a sovereign activity not subject to challenge in foreign courts.

The plaintiff also argues that the rhesus monkeys in suit are *ferae naturae*, and thus Bangladesh has merely engaged in activity which any landowner might engage in, by allowing private parties to hunt upon private land. This argument is inventive, but I reject it. The doctrine has never applied to primates and I doubt that it applies here. More importantly, even assuming that the doctrine applied to the area and superseded local customary law, such a doctrine has clearly been displaced by the sovereign actions of Bangladesh in regulating the taking and exporting of wildlife within its borders. Indeed, if the monkeys in suit were really *ferae naturae*, plaintiff had no need for a license to take them and has not been

harmed by Bangladesh's cancellation of that license. Plaintiff need only secure permission of individual landowners in order to proceed with its activities. Plaintiff's argument ignores the fact that Bangladesh also granted an *export* license in the Licensing Agreement, which is obviously a governmental, not a proprietary act.

The plaintiff also argues that Bangladesh's action is merely that of an individual landowner, and thus "commercial." The power to regulate the taking of game upon land owned by the landowner is an aspect of sovereignty, attached to land and derived from feudal precedent, which is subordinate to the State's overriding police power. It is clear that Bangladesh is acting as a sovereign in this case. As noted in *Intern. Assn. of Machinists v. OPEC*, 477 F. Supp. 553, 568 (C.D. Cal. 1979), *aff'd on*

alternative grounds, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), "The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes." The *OPEC* cases concerned an alleged price-fixing conspiracy entered into by the OPEC nations. The Court reasoned that even assuming that the price-fixing would be illegal if engaged in by private citizens, the sovereign state must often engage in regulation of a nation's natural resources. This is by its nature a sovereign function not subject to challenge in this suit.

My ruling is consistent with *Texas Trading v. Federal Republic of Nigeria*, 647 F.2d 300, 308-310 (2nd Cir. 1981), *cert. denied*, 454 U.S. 1148, 102 S. Ct. 1012 (1982). There, the Second Circuit held

that Nigeria was subject to suit for breach of contracts it entered into for the purchase of cement. The purpose of the purchases -- economic development encouraged at state expense -- was irrelevant under the Act. *Id.* at 647 F.2d 310. There were no sovereign capacities in issue in that case as anyone can order delivery of cement. The present suit, however, would require the court to "second guess" Bangladesh in the exercise of its sovereign function as regulator of wildlife. Such extraterritorial jurisdiction for United States courts over foreign sovereigns exercising their sovereignty is barred by the Act.

B. This Suit Is Barred by the Act of State Doctrine.

This action is also barred by the Act of State Doctrine, *see IAM v. OPEC* at 649 F.2d 1358-1362, because resolution of this suit would require the court to "adjudicate

a politically sensitive dispute which would require the court to judge the legality of the sovereign act of a foreign state." *Id.* at 1358. In considering the application of the Act of State Doctrine, I must assess the purpose of the governmental action at issue -- an inquiry which is not relevant under the FSIA. *Id.* at 1360. "When the state *qua* state acts in the public interest, its sovereignty is asserted." *Id.* It is clear in this case that Bangladesh has acted to regulate wildlife within its borders for the purpose of aiding "the public interest" of its citizens. That regulation is a sovereign act which this suit would overturn. Such second-guessing of the sovereign is barred by the Act of State Doctrine. *Id.*

Also relevant in applying the Act of State Doctrine are "the availability of internationally-accepted legal principles which would render the issues appropriate

for judicial disposition," and the suit's "potential for interference with our foreign relations." *Id.* at 1360-1361. Consideration of these factors also weighs in favor of the application of the Act of State Doctrine to bar this action.

There is no internationally-accepted legal principle to which all states adhere in regulating their wildlife. Such regulation is a function of public and private pressures, relative wealth, climate, and population densities which compete for resources. This court has no expertise in the area of the proper regulation of the wildlife of Bangladesh. No court does. There is no "issues appropriate for judicial disposition." *Id.* at 1361.

Consideration of the effect this suit might have on our foreign relations warrants application of the Act of State Doctrine.

> "The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world."

Id. at 1358.

Resolution of the merits of the controversy could "risk disruption of our country's international diplomacy" and

could "embarrass the United States in the eyes of the world."

The entertaining of this suit could give rise to charges of colonialist bias in third world countries. The United States would not surrender its sovereign power over wildlife within its borders to the decisions of another government. The entertaining of such a suit seeking the reverse could give rise to diplomatically embarrassing charges of a double standard in international sovereignty. Plaintiff seeks $15 million in damages for the breach of Bangladesh's agreement to license the plaintiff. Assuming that such damages could be proved to the satisfaction of the court -- a question which, in light of my disposition of this case, I need not decide, *see 28 U.S.C. § 1608(e), Wright, Miller, and Kane, Federal Practice and Procedure*, Civil 2d, § 2688 (ed. 1983) -- such a ruling would require that I overturn

Bangladesh's own view of its public interest in wildlife management. Further, in order to ascertain the damages it would be necessary for the court to decide whether plaintiff complied with the Agreement in regard to the "breeding farm" as well as the use of the monkeys. Bangladesh takes the position that delivery of the animals to the Armed Forces Radiobiology Research Institute at Bethesda, Maryland, where they were used in radiobiological research, violated the requirement that the monkeys be used "exclusively . . . for the general benefit of all peoples of the world." A ruling on whether or not radiobiological research is or is not for the general benefit of all peoples of the world will "embarrass the United States in the eyes of the world." *IAM v. OPEC, supra,* at 649 F.2d 1358.

My review of the above facts convinces me that the Act of State Doctrine applied to bar this action.

CONCLUSION

I lack jurisdiction over this action. This action is also barred by the Act of State Doctrine. The plaintiff's motion for

a default judgment will be denied, and the action dismissed.[1]

Dated this 18th day of August, 1983.

/s/ James A. Redden
United States District Judge

---

[1]Plaintiff objected to the filing of a brief by *amicus curiae*. While the *amicus* here arguably lacks the stake in controversy which might be required by principles of "standing" or intervention under Fed. R. Civ. Pro. 24, such is not required for the filing of an *amicus* brief. *Henderson v. International Union of Op. Eng.*, 420 F.2d 802, 806 n. 2 (9th Cir. 1969); *EEOC v. Local Union No. 3*, 416 F. Supp. 728, 732 (N.D. Cal. 1974). An *amicus* need not have any particular stake in a controversy, and serves merely to inform the court of applicable precedent or of considerations of the public interest. The participation of such an *amicus* is often helpful in cases such as this one, where one party is unrepresented, yet the court has a duty under the law to consider that party's interest. 28 U.S.C. § 1608(e); *see Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir. 1970); *Alexander v. Hall*, 64 F.R.D. 152, 155 (D. S.C. 1974). I find that *amicus* filings have been useful and direct that they form part of the record in this case. Of course, the disposition of this case has turned upon issues of jurisdiction and prudential considerations which this court would be obliged to notice on its own motion.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MOL, INC.,	)	
	)	
Plaintiff,	)	Civil No. 82-892-RE
	)	
v.	)	ORDER
	)	[filed August 19,
THE PEOPLES REPUBLIC OF BANGLADESH,	)	1983]
	)	
	)	
	)	
Defendant.	)	

REDDEN, Judge:

The plaintiff's motion for default judgment is DENIED. This action is DISMISSED.

Dated this 18th day of August, 1983.

/s/ James A. Redden
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MOL, INC.,	)	
	)	
Plaintiff,	)	Civil No. 82-892-RE
	)	
v.	)	JUDGMENT
	)	[filed August 19,
THE PEOPLES REPUBLIC OF BANGLADESH,	)	1983]
	)	
	)	
	)	
Defendant.	)	

Based on the record,

IT IS ORDERED that this action is dismissed.

Dated this _____ day of August, 1983.

/s/ Robert M. Christ

_____

Clerk, United States
District Court

28 U.S.C. § 1330. Actions against foreign states.

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of

any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. § 1603. Definitions.

For purposes of this chapter --

(a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity --

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title,

nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction.

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

Government of the People's Republic of Bangladesh
Ministry of Agriculture & Forests
Region-11 (Forest)

No. II-6 Dated, Dacca, the 3rd Jun/79.

Notice

The Agreement executed between the Govt. of the People's Republic of Bangladesh represented by the defunct Forest, Fisheries and Livestock Division and M/S MOL Enterprises Inc. (USA) on the 20th day of March, 1977, is hereby terminated under provision of Article 43 of the said Agreement for non-fulfilment [sic] of Licensee's obligations under Article 5 and Article 33 thereof with immediate effect.

The Licensee had to establish an initial experimental breeding farm during 1978. Till May, 78 the Licensee did not take any step in this regard. Even on receipt of show cause notice issued by this Govt. the Licensee did not submit any scheme/plan/estimate with regard to the

establishment of the said breeding farm. Thus the Licensee did not fulfill its obligations under Article 5.

Article 33 of the Agreement provides that the primates exported by the Licensee from Bangladesh shall be exclusively used for the purpose of medical and other scientific research by the highly skilled and competent personnel for general benefit of all the peoples of the world; but the Rhesus monkeys exported from Bangladesh by the Licensee were sold to the Armed Forces Radiobiology Research Institute for neutron bomb radiation experiments.

[Executed on behalf of the Ministry June 3, 1979]

Office - Supreme Court, U.S.
FILED
NOV 2 1984
ALEXANDER L. STEVAS
CLERK

No. 84-539

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MOL, INC., Petitioner,

v.

THE PEOPLE'S REPUBLIC OF
BANGLADESH, Defendant.

BRIEF OF AMICUS CURIAE, ATTORNEYS FOR ANIMAL RIGHTS, IN OPPOSITION TO PETITION FOR CERTIORARI

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Amicus, Attorneys for Animal Rights (AFAR), respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking a review of the decision of the United States Court of Appeals for the Ninth Circuit (reported at 736 F.2d 1326 (1984)), reproduced as Appendix A to the petition.

INTEREST OF AMICUS

Amicus, Attorneys for Animal Rights, is an unincorporated charitable and tax-exempt professional association with a nationwide membership of law students and attorneys. It maintains its principal office in San Francisco, California.

Amicus has, as a primary purpose, the protection of all animals, particularly endangered and threatened species. Amicus has a strong interest in insuring that proper legal procedures are followed in all

cases where the welfare of such animals may be at issue. Amicus has commenced litigation and otherwise intervened in court actions when necessary to protect animals.

Attorneys for Animal Rights participated in this proceeding as an amicus curiae in both the District Court (App-40) and the Court of Appeals. By letter dated October 23, 1984, a copy of which will be supplied to the Clerk of this Court, petitioner, through its attorney, has stated it has no objection to the filing in this Court of an amicus curiae brief.

QUESTION PRESENTED

When a foreign state, pursuant to its sovereign power to regulate its indigenous wildlife, enters into an exclusive export license and later revokes

it, is that foreign state immune from suit arising out of such revocation, under the Foreign Sovereign Immunities Act ("FSIA," 28 U.S.C. section 1601 et seq.)?

STATEMENT OF THE CASE

In March of 1977, the People's Republic of Bangladesh granted an exclusive license to MOL Enterprises, Inc., an Oregon corporation, for the export of macaca mulatta (rhesus) monkeys. Under the terms of the license, the exported primates were to be used exclusively for the purposes of medical and other scientific research for the general benefit of all peoples of the world. App-2.[1/] In order to protect

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1/ Rhesus monkeys are valuable animals for the conduct of scientific and medical research; see Opinion of the district court at App-12.

the existing wild population from depletion due to overtrapping and to establish a stable population of rhesus monkeys, the licensee had a duty to establish in Bangladesh a facility for the captive breeding of rhesus monkeys. The license also imposed limitations on the number of monkeys that could be taken from the wild for export purposes, imposed a duty to conduct population surveys of wild monkeys, and required that the license agreement be implemented without endangering the wildlife populations and environment of Bangladesh.

The government of Bangladesh expressly reserved its right to terminate the license in case of any non-performance of its requirements. App-15. On January 3, 1979, Bangladesh exercised that reserved power of termination and revoked MOL's

export license. The termination notice recited that MOL had failed to fulfill its obligations under the license because it had not constructed a breeding farm and because it sold monkeys to the Armed Forces Radiobiologic Research Institute for neutron bomb radiation experiments. App-48.

In 1982, MOL filed suit in the United States District Court for the District of Oregon, claiming that Bangladesh had breached its "contract" with MOL, and seeking $15,000,000 in damages. The Peoples' Republic of Bangladesh made no appearance. The District Court denied MOL's motion for a default judgment and, on its own motion, dismissed the lawsuit. The court held that it had no jurisdiction over Bangladesh under the Foreign Sovereign Immunities Act, 28 U.S.C. section 1601 et seq., and alternatively, that the act of

state doctrine precluded the court's adjudication of the dispute. 572 F. Supp. 79 (D. Oregon 1983).

On appeal, the Court of Appeals affirmed on the statutory ground, holding that Bangladesh was immune from suit under the FSIA because the "revocation [of the license] was sovereign in nature, not commercial." App-10.

REASONS WHY THE WRIT SHOULD BE DENIED

The Petitioner fails to meet the requirements for the exercise of certiorari jurisdiction. Supreme Court Rule 17 provides that certiorari shall be granted only "when there are special and important reasons therefor." These reasons include:

> When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter . . . or has so far departed from the accepted

> and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.

The Petition does not set forth any conflict among the courts of appeals regarding the scope of FSIA immunity. Petitioner merely recites "recent cases" that "struggle" with the commercial activity exception to sovereign immunity of foreign states (Pet. at 10-11). Petitioner cites no cases that involve any conflict whatsoever between circuits as to the commercial activity exception to sovereign immunity, 28 U.S.C. section 1605(a)(2).

Moreover, the Court of Appeals opinion does not depart from accepted and usual judicial proceedings. The Court of Appeals held that, ". . . because the granting and revocation of a license to export a natural resource are sovereign

acts, we have no jurisdiction over this claim." App-1. Petitioner's argument that the Court of Appeals opinion extends a "blanket immunity" to foreign sovereigns for any act or decision involving natural resources is disingenuous in light of the concessions it made before the court. There, petitioner admitted that licensing the exploitation of natural resources is a sovereign activity. App-7. Therefore the court had only to decide whether the revocation of such a license likewise constituted a sovereign act. Id.

Given the petitioner's litigation posture, the Court of Appeals had no reason to distinguish the sovereign acts of granting or revoking a license with respect to a scarce natural resource from commercial activity engaged in by a sovereign that would subject it to federal

court jurisdiction under the FSIA.[2/] Contrary to petitioner's contentions, the Court of Appeals by no means extends a "blanket immunity" to foreign sovereigns for any act or decision involving natural resources, since petitioner itself conceded that the issuance of the license for the export of wild primates constituted a sovereign act.

Petitioner makes the same concessions before this Court that it made in the Court of Appeals. It admits that the "Ninth Circuit here held that the

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2/ Other circuit courts, however, have had little difficulty distinguishing "commercial activity" carried on by sovereigns from noncommercial activity protected under the FSIA. See, e.g., Texas Trading & Milling Corp. v. Fed. Republic of Nigeria 647 F.2d 300 (2d Cir. 1981); Jackson v. People's Republic of China, 550 F. Supp. 869 (N.D. Ala. 1982); and Wyle v. Bank Melli of Tehran, Iran, 577 F. Supp. 1148 (N.D. Cal. 1983).

granting of a license or contract to exploit natural resources is not a 'commercial activity' within the meaning of the FSIA, a proposition with which petitioners do not quarrel." Pet. at 11; emphasis added. Later, petitioner repeats that Bangladesh "may have decided in its sovereign capacity that the agreement should contain certain terms. Those decisions are not challenged here. . . ." Pet. at 22.

Petitioner thus presents to this Court the same argument it presented to the Court of Appeals: that, because Bangladesh chose to revoke the license by exercising a power specifically reserved in the license agreement, rather than by decree, executive order or other "governmental act," Bangladesh therefore engaged in a commercial

act subject to FSIA jurisdiction. The Court of Appeals correctly rejected this argument, refusing to define so narrowly the "act" in question. The court looked not only at the termination of the license agreement, but also at the nature of the activity involved -- the sovereign's regulation of its indigenous wildlife.[3/]

The reasons given by Bangladesh for the revocation -- the failure of the licensee to establish a captive breeding farm to sustain the population of rhesus monkeys and its use of rhesus monkeys in

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3/ The FSIA specifically requires an evaluation of the "nature of the course of conduct" rather than its purpose, in evaluating whether immunity applies. 28 U.S.C. section 1603(d).

neutron bomb radiation experiments -- clearly implicated its sovereign powers over natural resources and foreign relations. The licensing agreement expressly reserved the power of revocation to Bangladesh. When it revoked the licensing agreement, it was exercising sovereign powers reserved under the terms of the licensing agreement to protect its wildlife.[4/]

As the Court of Appeals noted, a "change in format" in the mode of exercise of any sovereign power does not change its

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4/ Control and regulation of wildlife is generally considered to be a sovereign function. Domestic law in the United States concerning the protection, use, and exploitation of natural resources, including wildlife, recognizes these as sovereign functions. See Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 386, 392 (1978), and Hughes v. State of Oklahoma, 441 U.S. 322 (1979).

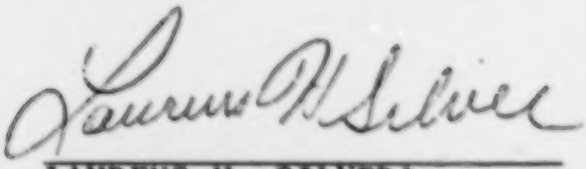
essential nature. See IAM v. OPEC, 477 F. Supp. 553, 568 n. 14 (C.D. Cal. 1979), affirmed on other grounds, 649 F.2d 1354 (9th Cir.), cert. denied, 454 U.S. 1163 (1981). When a sovereign exercises its power over wild animals by issuing an export license, and gives express notice to the licensee that a power of termination was being reserved, the revocation of the earlier sovereign act must itself be a sovereign act. If, as petitioner concedes, there is immunity under FSIA with respect to the issuance of the export license involving wild indigenous animals, there must be immunity under the FSIA with respect to the revocation of that license. The Court of Appeals properly rejected petitioner's arguments that Bangladesh engaged in a "commercial act" when it cancelled the licensing agreement.

CONCLUSION

The Petition for Certiorari should be denied. Petitioner's arguments for granting the Writ fail to meet this Court's own standards, as set forth in Rule 17. There is no conflict among the Courts of Appeals, nor does the Court of Appeals opinion in this case depart in any way from accepted judicial proceedings. The Court of Appeals correctly determined that the District Court did not have jurisdiction over the government of Bangladesh with respect to its sovereign acts regulating

its indigenous wildlife by cancellation of an export license.[5/]

Respectfully submitted,



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October 31, 1984

5/ The Court of Appeals decision does not conflict with any applicable decision of this Court. Rule 17(1)(c). Moreover, the act of state doctrine is an appropriate alternative ground for dismissal of this lawsuit, as held by the District Court. See App. at 33-39.